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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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DOUG LITTLE - Chairman

AUG 23 2016

BOB STUMP

BOB BURNS

TOM FORESE

ANDY TOBIN

DOCKETED BY

In the matter of:

DOCKET NO. S-20930A-15-0211

Franklin AAA Holdings, LLC, a Texas limited
liability company, andSECURITIES DIVISION'S RESPONSE
TO REQUEST FOR PRODUCTION OF
DOCUMENTS

Anthony Clavien, a single man,

Respondents.

The Securities Division of the Arizona Corporation Commission ("Division") hereby responds to respondent Anthony J. Clavien's Request for Production of Documents ("Production Request"). Respondent's Production Request includes 13 "Requests for Production." Request No. 1 requests the Division's entire investigative file (Clavien defines the term "ACC" to mean the Division). The remaining 12 requests are for specific portions of the investigative file including all communications relating to the investigation and all documents acquired by the Division in this case.

All requests other than Request No. 10—"All exhibits that the ACC intends to introduce at any hearing or proceeding in this case"—fall well outside of discovery limits for administrative proceedings under both the Arizona Revised Statutes and Corporation Commission Rules of Practice and Procedure, R14-3-101, *et seq.* ("Commission Rules"). The Commission Rules, which do not incorporate the discovery procedures found in the Arizona Rules of Civil Procedure ("ARCP"), require Clavien to demonstrate "reasonable need" for his request. He made no attempt to do so. And it is very unlikely that he would have been able to demonstrate this need even if he had made the attempt.

1 In addition to failing to satisfy the applicable law, Clavien is precluded from obtaining most of
2 the information he requests due to privilege, the confidentiality statute found at A.R.S. § 44-2042, and
3 because his Production Request is overly broad and burdensome.

4 Finally, Clavien filed his Production Request before the August 24, 2016 due-date for
5 exchanging exhibits and lists of witnesses (“LWE”), as established by Administrative Law Judge Marc
6 Stern’s procedural order issued on August 1, 2016. On or prior to August 24, the Division will provide
7 its exhibits and lists of witnesses, complying with the order and the law governing administrative
8 proceedings. The exhibits and witnesses will support the allegations in certain paragraphs of the
9 Division’s Notice of Opportunity for a Hearing Regarding Proposed Order to Cease and Desist,
10 Order for Restitution, for Administrative Penalties, and for Other Affirmative Action (“Notice”). In
11 conformance with established law and procedure, respondents will have the opportunity to review
12 the LWE and then examine witnesses called at hearing.

13 Because the Production Request is inappropriate and unlawful, the Division requests that the
14 Commission deny the Production Request.

15 This response is supported by the following Memorandum of Points and Authorities.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. DISCUSSION**

18 A. Discovery for administrative proceedings within Arizona is available only within the limits
19 defined by statute and agency rule in administrative proceedings.

20 Clavien requests the entire file of the Division. This includes notes, transcripts (including
21 transcripts of sworn testimony), communications, recordings (including recordings of investors and
22 complainants), memorandums, and any other documents of any kind.

23 Clavien’s Production Request does not fall within the limits defined by statute or
24 Commission Rules for administrative proceedings.

25 The statutes and rules explicitly addressing discovery procedures in contested administrative
26 adjudications before the Corporation Commission are found in Arizona Revised Statutes, A.R.S. § 41-

1 1001, *et seq.* and the Commission Rules. A.R.S. § 41-1062 makes it clear that the only forms of pre-
2 trial discovery permitted in administrative proceedings are 1) subpoenas, based on a showing of need
3 and authorized by the administrative hearing officer; 2) depositions, based on a showing of need and
4 authorized by the hearing officer; and 3) any other discovery provision specifically authorized under
5 the individual agency's rules of practice and procedure. The statute reads:

6 Unless otherwise provided by law, in contested cases the following shall apply:....The
7 officer presiding at the hearing may cause to be issued subpoenas for the attendance of
8 witnesses and for the production of books, records, documents and other evidence and
9 shall have the power to administer oaths... Prehearing depositions and subpoenas for the
10 production of documents may be ordered by the officer presiding at the hearing, provided
11 that the party seeking such discovery demonstrates that the party has reasonable need of
the deposition testimony or materials being sought... *Notwithstanding the provisions of
section 12-2212, no subpoenas, depositions or other discovery shall be permitted in
contested cases except as provided by agency rule or this paragraph.* (Emphasis added).

12 Under the relevant Commission Rules, discovery is limited. The presiding administrative law
13 judge may direct a pre-hearing conference wherein an arrangement is made for the exchange of
14 proposed exhibits, witness lists, or prepared expert testimony.¹ A party may gain access to additional
15 pre-hearing materials by way of a discretionary ALJ order requiring that the parties interchange copies
16 of exhibits prior to hearing.² Commission administrative law judges often cite these two rules in
17 ordering parties to file a list of witnesses and exhibits at a time and date in advance of the hearing,
18 thereby facilitating the hearing preparation process.

19 This limited discovery consistent with A.R.S. § 41-1062(A)(1), which states that an
20 administrative hearing "may be conducted in an informal manner and without adherence to the rules of
21 evidence required in judicial proceedings." Thus, administrative proceedings like this one are intended
22 to be less costly and speedier than civil litigation governed by the ARCP. Commission Rule R14-3-
23 101(B) also embodies this notion: "These [Commission Rules] shall be liberally construed to secure
24 just and speedy determination of all matters presented to the Commission."
25

26 ¹ A.A.C. R14-3-108(A).

² A.A.C. R14-3-109(O) & (P).

1 Court decisions provide additional authority on the limits of discovery in administrative
2 proceedings. These decisions make two salient points.

3 The first is that, because administrative proceedings derive from an entirely distinct process,
4 the rules of civil procedure for discovery do not apply in administrative proceedings.³ This principle
5 is particularly important from a policy standpoint since having civil discovery rules control the
6 administrative arena would have many deleterious results including: 1) allowing respondents to
7 access confidential investigative information far removed from the witnesses and exhibits relevant
8 to the active case against them; 2) allowing respondents to protract the proceedings indefinitely; 3)
9 allowing respondents to excessively consume scarce but vital government resources better expended
10 on other matters necessary for the protection of the public; and 4) allowing respondents to force the
11 agency into the position of a civil litigant rather than into its proper role as a governmental regulatory
12 authority.

13 The second point is that the authority to pursue discovery during the course of an
14 administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly
15 recognized that there simply is no basic constitutional right to pretrial discovery in administrative
16 proceedings.⁴ Accordingly, discovery in an administrative proceeding is only authorized to the
17 extent that it is explicitly provided for in a separate statute or rule.⁵ And, as discussed in the preceding
18 paragraphs, the statutes and Commission Rules provide for disclosure as ordered by an ALJ.

19 In this case, on August 1, 2016, ALJ Stern ordered the Division and respondents to exchange
20 their LWEs on August 24, 2016, and set the matter for final contested hearing on October 24, 2016,
21

22 ³ See, e.g., *Pacific Gas and Electric Company*, 746 F.2d 1383, 1387 (9th Cir. 1984); *Silverman v. Commodity Futures*
23 *Trading Commission*, 549 F.2d. 28, 33 (7th Cir. 1977); *Banister v. U.S. Department of Treasury*, 2011 WL 7109220
(N.D. Cal. 2011); *In re City of Anaheim, et al.*, 1999 WL 955896, 70 S.E.C. Docket 1848 (the federal rules of civil
24 procedure do not properly play any role on the issue of discovery in an administrative proceeding).

24 ⁴ *Silverman*, 549 F.2d. at 33; *Pet v. Dep't of Health Services*, 542 A.2d 672 (Conn. 1988) ("The Constitution does not
25 require that a respondent in an administrative proceeding be aware of all evidence, information and leads to which
26 opposing counsel might have access.").

25 ⁵ *Pet*, 542 A.2d at 678; *Pacific Gas & Electric Co. v. F.E.R.C.*, 746 F.2d 1383, 1387 (9th Cir.1984); See also 73A
26 C.J.S. *Public Administrative Law and Procedure*, § 124 (1983) ("Insofar as the proceedings of a state administrative
body are concerned, only the methods of discovery set forth by the pertinent statute are available, and the methods not
set forth therein are excluded").

1 with the parties further ordered to set aside October 25–27 as additional hearing dates. The Division
2 will comply and disclose its LWE on or (in its discretion) prior to August 24. Any discovery beyond
3 that is not permitted by Arizona law or Commission Rules.

4 B. Clavien has not demonstrated a reasonable need for his Production Request, a request that
5 asks for Division’s entire file, including all notes and communications.

6 In addition to the discovery limitations discussed above—and the confidentiality statute,
7 privilege, and other policies discussed below—A.R.S. § 41-1062(A)(4) requires that the party
8 demonstrate a reasonable need for the production requested. In his Production Request, Clavien
9 does not assert, much less demonstrate, that he has a reasonable need for the production he is
10 requesting.

11 It is highly unlikely that Clavien could demonstrate that he has a reasonable need for the
12 incredibly broad discovery he is seeking. The Division’s allegations have not changed since the
13 Division filed its Notice on June 24, 2015, served on Clavien on March 15, 2016. Thus, Clavien
14 been apprised since at least March 15, 2016 of the allegations against him. The respondents in
15 Commission cases can bring their own evidence and conduct cross-examination⁶; they have their
16 own duty of due diligence if they plan on refuting any or all allegations listed in the Notice. Clavien
17 has had ample time to obtain any and all relevant documents to defend against the Division’s
18 allegations.

19 Moreover, Clavien can use his own personal knowledge of the respondent entity’s business
20 operations to identify sources of documents and testimony that might be used in his defense.
21 Clavien was the initial manager of respondent Franklin AAA Holdings (“FAH”). He was the person
22 primarily responsible for finding investors, meeting with them, and selling the investments. Clavien
23 knew who the members, managers, and employees of the company were. Thus, it would be
24 unreasonable for Clavien to argue that he does not have the ability to locate documents and
25 witnesses for his defense. The fact that the Division may be in possession of certain documents and
26

⁶ A.R.S. § 41-1062(A)(1); A.A.C. R14-3-104.

1 thus it would be more convenient for the respondents to obtain them from the Division is not a
2 sufficient basis in which to request and grant such discovery. Since the Production Request is devoid
3 of any showing—or even assertion—of reasonable need, the request should be denied.

4 C. Arizona statute explicitly prohibits the Division's disclosure of certain information unless
5 an applicable exception applies; Clavien failed to assert or establish any applicable
6 exemption.

7 The Division's disclosure of documents is limited by A.R.S. § 44-2042, which requires the
8 Division to keep complaints and several other documents confidential:

9 **The names of complainants and all information or documents obtained by any officer,**
10 **employee or agent of the commission,** including the shorthand reporter or stenographer
11 transcribing the reporter's notes, in the course of any examination or investigation are
12 confidential unless the names, information or documents are made a matter of public record. **An**
13 **officer, employee or agent of the commission shall not make the confidential names,**
14 **information or documents available to anyone** other than a member of the commission,
another officer or employee of the commission, an agent who is designated by the commission
or director, the attorney general or law enforcement or regulatory officials, **except pursuant to**
any rule of the commission or unless the commission or the director authorizes the
disclosure of the names, information or documents as not contrary to the public interest.
(Emphasis added).

15 The Division's compliance with the confidentiality statute is mandatory. Clavien fails to cite any
16 Arizona statute or rule that would require the Division to disclose all information and documents,
17 including investor complaints, which the Division may have obtained from testifying witnesses or
18 otherwise be confidential. Clavien has not cited any authorization by the Commission or Division
19 director that would obviate the Division's required compliance with the confidentiality statute.

20 Additionally, after the Division discloses its LWE and the names of its witnesses as required
21 by the procedural order, the confidentiality statute will still apply. The LWE will be provided to
22 respondents and the ALJ; it will not be docketed or published. Consequently, all documents,
23 information, and if applicable, complaints obtained in the course of investigation will not become
24 public record. Unless and until those documents and information are made public, the confidentiality
25 provision will apply.
26

1 D. The work-product doctrine protects notes and information created by Division employees.

2 Clavien's request for materials and information prepared by Division employees should be
3 denied as, in addition to the reasons set forth above, such materials are protected from discovery by
4 the work-product doctrine. The U.S. Supreme Court articulated the work-product doctrine in
5 *Hickman v. Taylor*.⁷ The *Hickman* court stated that the general policy against invading the privacy
6 of an attorney's preparation is essential to an orderly working of the system of legal procedure.⁸
7 Arizona practice conforms to *Hickman*.⁹

8 Courts have found that a variety of documents and things are protected by the work-product
9 doctrine including:

- 10 • Witness statements taken during the course of litigation preparation and materials that
11 reflect the attorney's mental impressions or opinions about a case receive protection from
12 disclosure¹⁰
- 13 • Trial preparation material prepared by a party's representatives, including investigators
14 working for attorneys¹¹
- 15 • Witness interviews and statements¹²
- 16 • Signed statements of witnesses and reports of investigations and other communications
17 prepared at the direction of government attorneys¹³
- 18 • Staff memorandum and communications between attorneys and investigators regarding
19 investigation¹⁴
- 20 • Formulation of questions propounded through questionnaires prepared by government
21 attorneys; court determined both questions and answers were protected¹⁵

22 ⁷ 329 U.S. 495, 67 S. Ct. 385 (1947).

23 ⁸ 329 U.S. at 512.

24 ⁹ *Longs Drug Stores*, 134 Ariz. at 428, 657 P.2d at 416; *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 191, 777 P. 2d 686, 689 (1989).

25 ¹⁰ *Longs Drug Stores v. Howe*, 134 Ariz. 424, 428, 657 P.2d 412, 416 (1983) citing *Hickman*, 329 U.S. at 511.

26 ¹¹ *Longs Drug Stores* at 430, 657 P.2d at 418; see also *U.S. v. Nobles*, 422 U.S. 225, 239 (1975).

¹² *Dritt v. Morris*, 357 S.W. 2d 13, 18 (Ark. 1962)

¹³ *U.S. v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 462 (E.D. Mich. 1954)

¹⁴ *S.E.C. v. World-Wide Coin Inv., Ltd.*, 92 F.R.D. 65, 66-67 (N.D. Ga. 1981).

¹⁵ *United States v. Deere & Co.*, 9 F.R.D. 523, 528 (D.C. Minn. 1949).

- Documents, videotapes, and simple forms with boxes to check that were sent to individuals¹⁶
- Recorded statements and written transcripts thereof from victim and insurance adjuster¹⁷
- Transcript from tape recording of conversations between defendant and government informant¹⁸
- Transcripts of audio taped statements of insurer's employees¹⁹
- Email from defendant to defendant's attorney and to defendant's daughter detailing facts surrounding a transaction²⁰
- Documents prepared by an accountant at the direction of an attorney²¹

In light of these court decisions, there is no doubt that the investigative interview memos, documents, memos and recordings prepared by Division employees, and emails obtained from witnesses are protected from discovery under this doctrine.

In order to obtain work product, Clavien must show that he has "a substantial need for the materials and cannot, without undue hardship, obtain the substantial equivalent by other means."²² Clavien has made no attempt to show substantial need or that he cannot obtain the information requested by other means. Clavien has equal access to the investors, equal access to their investment documents, and equal access to background information. He has the ability to subpoena third parties during the pendency of this action with a showing of reasonable need. Clavien simply does not want to (or has failed to) put in the time, effort and resources to prepare his case. Instead, he wants to have the information handed to him by the Division. That does not constitute substantial need.

E. The Production Request is unreasonably overbroad, unduly burdensome, and oppressive.

The Commission has the ability to prohibit a subpoena if it is "unreasonable or oppressive." R14-3-109(O). On its face, Clavien's Production Request is unreasonably overbroad, unduly

¹⁶ *Hertzberg v. Veneman*, 273 F. Supp. 2d 67 (D.D.C. 2003).

¹⁷ *Maguire v. State*, 458 S.2d 311, 312 (Fla. Dist. App. 1984).

¹⁸ *U.S. v. Salsedo*, 607 F.2d 318, 320 (9th Cir. 1979).

¹⁹ *Gargano v. Metro-North*, 222 F.R.D. 38, 40 (D. Conn. 2004).

²⁰ *U.S. v. Stewart*, 287 F.Supp.2d 461, 466 (S.D.N.Y. 2003).

²¹ *In re Grand Jury Proceedings*, 601 F.2d 162, 166 (5th Cir. 1979).

²² ARCP 26(b)(3).

1 burdensome, and oppressive. First, as discussed above, the blanket request for the entire file, and
2 every request other than Request No. 10 blatantly disregards the controlling provisions of the
3 Administrative Procedure Act, the Commission Rules, and the confidentiality provision of A.R.S.
4 § 44-2042(A).

5 Second, the Division is limited in its ability to disclose certain information by several
6 statutes: A.R.S. §§ 41-4172, 41-4172 & 13-2001 (personal and entity identifying information);
7 U.S.C. § 405(c)(2)(C)(viii) (social security numbers); A.R.S. § 44-1373 (personal identifying
8 information); A.R.S. § 13-4051 (certain arrest records); A.R.S. § 41-1750 (criminal history
9 information). If the Division were to have to produce its entire investigatory and case files for this
10 matter, it would have to expend significant resources to review each and every document and then
11 redact confidential information to avoid violating these statutes. Imposing such a burden on the
12 Division when Clavien has the ability to obtain all information he needs to defend himself through
13 other means is untenable.

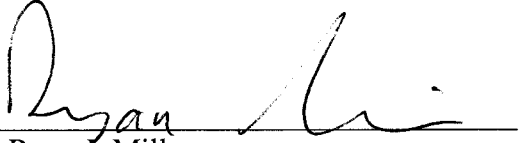
14 If the Production Request is not denied for all the other reasons set forth above, it should be
15 denied as unreasonably overbroad, unduly burdensome, and oppressive.

16 **II. CONCLUSION**

17 The discovery rules for contested administrative proceedings in Arizona are expressly
18 established by statute and agency rule. Those rules limit discovery to disclosures ordered by the
19 ALJ. In this case, that is an exchange of LWEs on August 24, which will satisfy Clavien's Request
20 No. 10. Discovery is further restricted to matters that are relevant and to instances where there is a
21 requisite showing of "reasonable need." Clavien has failed to even assert that he has a reasonable
22 need for any portion of his request. Since Clavien had detailed knowledge about FAH's operations
23 and its investors, Clavien is perfectly capable of preparing his own defense without going on a
24 fishing expedition through Division files. Thus, it is unlikely that Clavien would be able to establish
25 a reasonable need for additional documents. Discovery in administrative procedures is limited
26 further still by confidentiality provisions and relevant policies, such as the work-product doctrine.

1 Clavien has offered no reason why he is entitled to protected and confidential materials. For all these
2 reasons the Commission should deny Clavien's Production Request.

3 RESPECTFULLY SUBMITTED this 23rd day of August, 2016.

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6 By 
7 Ryan J. Millecam
8 Attorney for the Securities Division of the
9 Arizona Corporation Commission
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1 On this 23rd day of August, 2016, the foregoing document was filed with Docket Control as a
2 Securities Division Response to Motion, and copies of the foregoing were mailed on behalf of the
3 Securities Division to the following who have not consented to email service. On this date or as soon
4 as possible thereafter, the Commission's eDocket program will automatically email a link to the
5 foregoing to the following who have consented to email service.

6
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12 Attorney for Respondent Clavien

13 **Consented to Service by Email**

14 COPY of the foregoing mailed this 23rd day of August, 2016, to:

15 Franklin AAA Holdings, LLC
16 c/o Antiquities Holdings, Dana Pierson – Manager
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18 Phoenix, AZ 85020

19 By: Karen Houk
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